



United States General Accounting Office
Washington, DC 20548

Comptroller General
of the United States

Decision

Matter of: Innovative Logistics Techniques, Inc.--Costs

File: B-289031.3

Date: February 4, 2002

Frank K. Peterson, Esq., Michael R. Hatcher, Esq., and Craig A. Holman, Esq., Holland & Knight, for the protester.
D.A. Ridgely, Esq., Department of the Army, for the agency.
Louis A. Chiarella, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

General Accounting Office declines to recommend that protester be reimbursed its protest costs where the agency promptly took corrective action in response to a supplemental protest and comments on the agency report that, for the first time, identified alleged flaws in the evaluation of quotations which the corrective action was designed to remedy.

DECISION

Innovative Logistics Techniques, Inc. (INNOLOG) requests that we recommend that it be reimbursed the costs of filing and pursuing its protests challenging the award of a delivery order to MPRI under request for quotations (RFQ) No. W73QKK-1180-0001, issued by the Defense Contracting Command (formerly Defense Supply Service – Washington) for weapon system management and readiness support services.

We deny the request.

The Army issued the RFQ on July 26, 2001 to five vendors, including INNOLOG and MPRI, under the Management, Organizational and Business Improvement Services (MOBIS) Federal Supply Schedule (FSS) contract. The solicitation sought quotes, including technical submissions, for weapon system management and readiness support. The RFQ contemplated the award of a delivery order for a 1-year period of performance, with four 1-year options.

The solicitation established three non-price factors: technical capability and understanding of requirement, personnel qualifications, and past performance. The solicitation stated that “past performance [was] less important than either

technical capability or understanding the requirement.” RFQ at 2. The RFQ was silent as to the relative weight of personnel qualifications. The RFQ also notified vendors that while price was less important than non-price factors, it nevertheless remained a substantial factor. The solicitation stated that award would be based on the quotation that represented the “best value” to the government.

On August 1, prior to the due date for receipt of quotes, INNOLOG, by means of an e-mail message, queried, “It is unclear how the government intends to evaluate Factor 2: Personnel Qualifications. First, there is no indication of its weight in the evaluation. . . . How will Factor 2 be weighted in the overall evaluation?” Agency Report, Tab 12. The Army’s response, which it provided to all vendors, declared that “[i]n Factor 2, the Government will look at individual qualifications, i.e., pertinent experience, education and the like in our evaluation of personnel to arrive at an overall evaluation for personnel.”¹ Agency Report, Tab 9, Consolidated Questions and Answers, at 1.

All five solicited vendors responded to the RFQ by the August 16 due date. The Army evaluated the technical submissions of vendors, and then made award to MPRI.² On September 27, following a meeting with the agency in which it learned the reasons for its nonselection for award, INNOLOG filed a timely protest with our Office.

INNOLOG raised three bases for its protest, one of which was that the agency had “failed to evaluate [quotations] in a manner that was consistent with the terms of the RFQ.” Specifically, INNOLOG alleged that notwithstanding the RFQ’s heavy emphasis on non-price factors, on which the protester detrimentally relied, the agency subsequently represented that award was based on the lowest price among five technically acceptable quotes.³ Protest at 8-10.

On October 29, the agency filed its protest report with our Office. The Army denied INNOLOG’s general allegation that the agency had failed to evaluate quotes in a

¹ The Army represents, and the protester does not deny, that INNOLOG took no further action in response to the agency’s answer here, but instead submitted a quotation. Agency’s Opposition to Protester’s Application for Costs at 3.

² When it evaluated the vendors’ technical submissions under the non-price factors, the Army’s technical evaluation team treated the technical capability and understanding of requirement factor and the personnel qualifications factor as equally important and, individually, more important than the past performance factor. Agency Report, Tab 7, Technical Evaluation Report, at 1.

³ In the factual background of its protest, INNOLOG restated the RFQ’s evaluation criteria without making reference to the fact that the personnel qualifications factor had no relative importance assigned. Protest at 3-4.

manner that was consistent with the terms of the RFQ, and refuted the specific issue that the contracting officer had improperly considered price to be as important or more important than non-price factors in making the award determination.

On November 8, INNOLOG filed a supplemental protest and comments on the agency report. While not raised as a basis for protest (presumably because it would be an untimely solicitation challenge), INNOLOG explicitly identified the fact that the relative weight of the personnel qualifications factor had never been indicated notwithstanding its preaward inquiry. The protester also noted that in evaluating vendors' technical submissions, the agency had actually treated the personnel qualifications factor as being of equal importance to the technical capability and understanding of requirement factor when in fact the RFQ had assigned no relative weight to the personnel qualifications factor. Protester's Comments and Supplemental Protest at 4-5, 13.

On November 16, 8 days after the protester's comments/supplemental protest had been filed, the agency requested dismissal of the protests because it had decided to take corrective action. The Army stated that it was taking corrective action because the RFQ had failed to completely or accurately inform vendors of the relative weights of non-price factors.⁴ Agency's Dismissal Request at 1. We dismissed the protests on November 20 because the Army's decision to cancel the award to MPRI and reassess the agency's requirements rendered the protests academic.

INNOLOG now requests that our Office recommend that the agency reimburse the protester's costs of filing and pursuing the protests, including attorneys' fees. INNOLOG argues that the agency did not take prompt corrective action, as the initial protest did allege that the agency had failed to evaluate quotes in a manner consistent with the RFQ, and that it had actually pointed out the specific RFQ defect even before the receipt of quotes. The agency opposes INNOLOG's request, arguing that corrective action was taken promptly in light of when INNOLOG first identified in the course of the protest the deficiency that became the basis for corrective action.

Our Bid Protest Regulations provide that where the contracting agency decides to take corrective action in response to a protest, we may recommend that the agency pay the protester the costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.8(e) (2001). We will make such a recommendation where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest.

⁴ The contracting officer stated that as a result of these problems she could not determine whether or to what extent any or all vendors may have been prejudiced in their technical submissions, so that she could no longer be confident of her original source selection. Agency's Dismissal Request, attach., Contracting Officer's Memorandum for the Record (Nov. 16, 2001), at 2.

Oklahoma Indian Corp.--Claim for Costs, B-243785.2, June 10, 1991, 91-1 CPD ¶ 558 at 2. Our rule is intended to prevent inordinate delay in investigating the merits of a protest and taking corrective action once an error is evident, so that a protester will not incur unnecessary effort and expense in pursuing its remedies before our Office. Professional Landscape Mgmt. Servs., Inc.--Costs, B-287728.2, Nov. 2, 2001, 2001 CPD ¶ 180 at __.

The promptness of the agency's action is measured relative to the time when the protester identifies the issue that prompts the corrective action. Where, as here, a protester introduces different issues in multiple submissions to our Office, the promptness of the agency's corrective action is not measured from the protester's initial protest where the initial protest did not identify the issue on which the agency based its corrective action. J.A. Jones Mgmt. Servs., Inc.--Costs, B-284909.4, July 31, 2000, 2000 CPD ¶ 123 at 3. The issue that INNOLOG's initial protest raised was whether the agency's evaluation of the relative importance of price vis-à-vis the non-price factors was consistent with the RFQ. It was not until its November 8 submission that the protester noted that the agency had evaluated personnel qualifications as of equal importance to technical capability, notwithstanding the absence of an assigned relative weight for the personnel qualifications factor. Once the Army reviewed that submission, it determined that the solicitation was defective. Consequently, the agency took corrective action on November 16, 8 days after the supplemental protest was filed and before the supplemental agency report was due. In our view, the agency took prompt corrective action under the circumstances presented here.⁵

INNOLOG also argues that the promptness of the agency's corrective action should be measured from the time that it first called the matter to the agency's attention. The protester points to the fact that it unambiguously asked the agency on August 1 how the personnel qualifications factor would be weighted in the overall evaluation. INNOLOG contends that as the Army knew or should have known of the defects in the relative importance of non-price factors some 3½ months prior to taking corrective action on the same, the agency unduly delayed taking corrective action. We disagree.

Our bid protest jurisdiction is limited by the Competition in Contracting Act to written objections to a solicitation, proposed award, or award of a contract filed with our Office. 31 U.S.C. §§ 3551(1), 3552 (Supp. IV 1998). Our authority to recommend payment of protest costs, including attorneys' fees, extends to parties whose protests to our Office support a finding that a procurement statute or regulation was violated. 31 U.S.C. § 3554(c)(1). The provision in our Regulations

⁵ As a general rule, so long as an agency takes corrective action in response to a protest by the due date of its protest report, we regard such action as prompt and decline to consider favorably a request to recommend reimbursement of protest costs. See J.A. Jones Mgmt. Servs., Inc.--Costs, supra, at 4.

providing for the possibility of a recommendation that protest costs be reimbursed where an agency takes corrective action in response to a protest with our Office is intended to ensure fair treatment of protesters who make substantial investments of time and resources to pursue clearly meritorious protests in this forum, but who do not have the opportunity to recoup their costs because of agency corrective actions. All Marine Servs., Ltd.--Entitlement to Costs, B-270514.2, Feb. 13, 1996, 96-1 CPD ¶ 75. It is not intended to ensure the fairness of agency-level processes occurring prior to the filing of a protest with our Office. R.J. Sanders, Inc.--Claims for Costs, B-245388.2, Apr. 14, 1992, 92-1 CPD ¶ 362 at 3. Quite simply, the fact that INNOLOG earlier raised the defect with the agency is of no significance to our determination whether the agency took prompt corrective action after INNOLOG filed its protest with our Office.

The request for a recommendation that the agency reimburse INNOLOG's protest costs is denied.

Anthony H. Gamboa
General Counsel